No. 80-1691

FILED
MAY 28 1981
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WHITE & CASE and MARION JAY EPLEY, III,
Petitioners,

v.

WACHOVIA BANK & TRUST CO., N.A., *et al.*,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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May 28, 1981

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1. Until this Court speaks, the lower courts and litigants will continue to be mired in the confused and confusing state of the law with respect to implied private rights of action under the federal securities laws. As Professor Louis Loss, the Reporter of the American Law Institute's Federal Securities Code, has stated in explaining one reason for the adoption of the Code:

> "[T]he law has become almost chaotic as a result of the judicial implication of private rights of action . . . ." I American Law Institute, Federal Securities Code, Intro. at xx (1980).

The "chaos" that has been sown by judicial implication of private rights of action under Section 10(b) of

the 1934 Act is described in the AICPA *amicus* brief.[1] The decision below, if allowed to stand, will create, in Judge Cardozo's words, "liability in an indeterminate amount for an indeterminate time to an indeterminate class," a result condemned by this Court in *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 748 (1975).[2] The issues for which certiorari is sought will continue to be litigated at length and at great cost to litigants and the judicial system unless this Court rules.

2. Respondents point to nothing—and there is nothing—in the language of the statute, its legislative history, or its legislative scheme which indicates that Congress intended to create a private right of action under Section 10(b) of the 1934 Act. As one commentator has recently stated, Section 10(b) cannot "plausibly be read as evincing a congressional intention to authorize private lawsuits." Frankel, *Implied Rights of Action*, 67 Va. L. Rev. 553, 564 (1981). *See also Aaron* v. *SEC*, 446 U.S. 680, 691 (1980); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. at 737. Indeed, "the implication of private rights of action has impeded rather than advanced the fundamental purposes of the securities acts." Frankel, *supra*, at 582.

3. On the retroactivity issue (question two of our petition), contrary to respondents' contention (Resp. Brief at 22-23), a fair reading of the Seventh Circuit's decision in *Schaefer* v. *First National Bank of Lincolnwood*, 509 F.2d 1287 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976), a Section 10(b) case, reveals that it

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[1] Brief of American Institute of Certified Public Accountants as *Amicus Curiae* in Support of the Petitions for a Writ of Certiorari, Nos. 80-1684/1691.

[2] *See also Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 214-15 n.33 (1976).

presents a fundamental and irreconcilable conflict with the District of Columbia Circuit's decision in the present case. *See* White & Case Pet. for Cert. at 23. The District of Columbia Circuit's decision also conflicts with the Second Circuit's recent decision in *Holzsager* v. *Valley Hospital*, No. 80-783 (2d Cir. April 10, 1981). In *Holzsager*, the Second Circuit refused to afford prospective-only treatment to a prior judicial decision, even though that "decision reversed established law" and thus satisfied the first criterion for nonretroactivity set forth in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971). Slip op. at 2499.

Respondents acknowledge (Resp. Brief at 21) that the question of which local statute of limitations should apply to private actions under Section 10(b) is in a state of flux—and has been since at least 1970, when the Eighth Circuit decided *Vanderboom* v. *Sexton*, 442 F.2d 1233 (8th Cir.), *cert. denied*, 400 U.S. 852 (1970). Each new decision applying not only a local statute of limitations but any rule of law arguably different from that previously applied will raise the *Chevron* issue. Accordingly, it is important that this issue be definitively resolved by this Court.

4. The important issues presented in the petitions should not be obscured by the misrepresentations with which Respondents' Brief in Opposition is replete. Respondents have resorted to blatantly false and misleading factual allegations as to White & Case and Mr. Epley. These allegations are not only irrelevant to the questions raised in this petition for certiorari but also seem designed to obfuscate those issues. The merits, or lack of merit, of respondents' underlying claims are not now before this Court.

Respondents also misrepresent the procedural history of this case. Contrary to respondents' statement (Resp. Brief at 10), petitioners *did* raise in the court below the question whether purchasers who allow their express

securities law remedies to become time-barred should nevertheless be allowed to claim an implied remedy under Section 10(b) and thereby obtain a longer limitations period.[3]

We ordinarily would not trouble the busy reader of a reply brief with a factual discussion that is not relevant to the questions presented to this Court. However, respondents have misstated basic facts going to the *bona fides* of White & Case and Mr. Epley and have done so with respect to matters as to which there is no dispute in the record. For example, it is not true that, in connection with the merger of NSMC and International National Corporation ("Interstate"), Mr. Epley and White & Case "declined to inform Interstate" of proposed accounting adjustments by PMM to NSMC's May 31, 1969 nine-month financial statements that would have reduced NSMC's earnings to a $180,000 loss. (Resp. Brief at 6.) On the contrary, no one—not even respondents—has ever previously disputed, and the District Court has expressly found, in a separate proceeding, that Mr. Epley "delivered one copy of the typed letter [which included the proposed PMM adjustments] to the conference room where the closing was taking place" and where it was immediately reviewed by representatives of Interstate. *SEC* v. *National Student Marketing Corp.*, 457 F. Supp. 682, 693 (D.D.C. 1978). Moreover, despite respondents' allegations with respect to the three companies that were acquired during November 1969 by NSMC (Resp. Brief at 6), no one has ever disputed the documented fact that the proposed adjustments were also disclosed to those companies.

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[3] *See* White & Case Reply Brief, October 18, 1979, at 5-8; PMM Reply Brief, October 18, 1979, at 14.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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